1991

Home Savings and Loan, a Utah corporation v. The Aetna Casualty and Surety Company : Reply to Brief in Opposition

Utah Supreme Court

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Callister, Duncan & Nebeker; Gary R. Howe; P. Bryan Fishburn; Scott A. Call; Attorneys for Appellee.

IN THE SUPREME COURT OF THE STATE OF UTAH

HOME SAVINGS AND LOAN, a Utah corporation,	)	
Plaintiff/Respondent and Cross-Appellant,	)	
v.	)	Case No. 910436
THE AETNA CASUALTY AND SURETY COMPANY,	)	
Defendant/Appellant.	)	

APPELLANT'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

On Appeal from the Opinion of the
Utah Court of Appeals Dated August 6, 1991.

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PREFATORY NOTE

Petitioner respectfully submits this reply to address Respondent's reliance on (1) previously unmentioned changes in fidelity bond forms and (2) the unreported opinion in First Security Bank of Utah, N.A. v. Aetna Casualty & Surety Co., No. NC-74-23W (D. Utah, July 11, 1984).

It is the inherent nature of third party fidelity losses that they raise what Home disparages as the potentially "metaphysical" question of when a third party's lawsuit should be deemed to be a "discovered" loss. Home, Aetna and the rest of the savings and surety industries agreed to eliminate such "metaphysical" disputes by drawing a bright line that makes the receipt of a third party's complaint the touchstone for loss discovery. The Majority Opinion below refused to enforce that agreement, and Home now seeks to characterize that refusal as too unimportant to be reviewed by this Court.

I. CHANGES IN THE INDUSTRY FORMS DO NOT RENDER THE ERROR BELOW INSIGNIFICANT. THE CHANGES MERELY MAKE THE ERROR MORE OBVIOUS.

The Majority Opinion below narrowly circumscribed the impact of a significant definition rider by ruling that although the rider defined a single concept (discovery of loss), it did so only with respect to one part of the contract (i.e., when notice must be given), and not with respect to the rest of the contract (i.e., the part limiting coverage to loss discovered within the bond period). Respondent now argues that such judicial rewriting should not be reviewed by this Court, because it is unlikely to happen again in precisely the same way, due to changes in industry forms. Even if such new bond forms were to have genuinely eliminated the issue of when loss is discovered (which they did not), this Court's review would still be appropriate to correct the manifest error herein and to guide the years of litigation that will continue under the old forms.

More importantly, Respondent's suggestion that changes in the governing forms will prevent repetition of the result below is essentially an admission, as Aetna and the Dissent recognized, that considerations of form (specifically, the mere location of standardized terms) wrongly prevailed over substance (the intended meaning of the words used). The new forms have merely moved what was in the rider (a bright line date-of-suit trigger for discovery of loss) and combined it in a single paragraph with language from the Preamble (the requirement that loss be discovered within the bond period to be covered). Aetna agrees that most of the rider's language now appears in the body of the bond, rather than in the rider, and that the language Aetna relies upon from the Preamble is now also in the body, closer to the language from the rider. To suggest that the significance of the holding, the likelihood of its recurrence, or the need for review have been affected by new bond forms that have simply relocated these same terms and concepts, strongly supports Aetna's request for review. If the Majority reached its contorted interpolation of a new date-of-verdict test solely or primarily because of these differences in location, this Court should grant review to base the result of this case on more fundamental principles of contract law.[1]

New forms for the next case do not change the error in this case. This Court is, fundamentally, a court of review and significant error has occurred. This Court has an interest in making sure that the proper precedents and rules of contract construction are employed to enforce contracts litigated in this State. These rules include the rule that contracts are to be given construction as a whole, the rule that terms are to be given a meaning that fulfills the unified purpose of this discovery bond contract, and the rule that

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[1]Aetna noted in its petition that the Majority Opinion only distinguished the opinion in Royal Trust Bank v. National Union Fire Ins. Co., 788 F.2d 719 (11th Cir. 1986), which had accepted Aetna's approach, by noting that Royal Trust had placed virtually identical bond language from the Preamble and rider together within the body of Section 4, instead of in a rider to Section 4 of the bond and in the Preamble.

judicial underwriting should not replace consensual commercial agreement. Those errors are important, regardless of the extent to which they will necessarily be repeated in identical form contracts in the future.

II. RESPONDENT'S CHRONOLOGY OF THE BOND'S DEVELOPMENT AND RESPONDENT'S RELIANCE ON FIRST SECURITY BANK OF UTAH V. AETNA UNDERSCORE THE NEED FOR SUPREME COURT REVIEW TO ENFORCE, RATHER THAN REWRITE, THE BOND CONTRACT.

As to the issue of what date should trigger discovery of loss in a discovery bond, this case has always been about whether Utah should approve ad hoc judicial underwriting, or should enforce the surety and banking industries' contractual use of a bright line test that creates predictability and obviates the need for judicial interpolation. Home's reliance on First Security and Home's description of how the discovery of loss terms have evolved do no more than reflect the intellectual debate that once could be waged over different "trigger" dates for coverage, at a time when the bond did not expressly define discovery of loss in third party situations. Different courts have embraced different triggers in the past. Home's citation to the unreported First Security opinion serves only to demonstrate that even within a single case (over ten years), two different Utah courts made opposite selections from an array of alternative trigger dates for defining discovery of loss in third party settings. That contract did not define discovery of loss, in third party situations, allowing one court to choose a date-of-judgment test, while another judge in the same case preferred the date-of-suit test. The Court below, despite contractual agreement to a date-of-suit test for discovery of loss, invented and chose a totally different (and unprecedented) date-of-verdict test.

The unreported First Security decisions were not constrained by the contractually agreed definition present in this case. Respondent compounded the confusion herein by insisting that its coverage was triggered by yet a fourth, undefined, alternative trigger, i.e., that date during pretrial proceedings when the insured suddenly started to believe the dishonesty allegations that had been made in the third party's complaint. First Security

reflected the confusion that results in a setting where no agreement has been made about when a third party loss situation will be deemed to be discovered for purposes of the discovery bond. The rider was adopted for exactly that reason. The Majority Opinion resurrects this confusion in a case where an agreement had been made but was not enforced by the Court below.

Respondent's reference to the "metaphysical" definition of "loss" as being something that the Court of Appeals "rejected" is mistaken. The Court of Appeals has embraced precisely the "metaphysical" exercise which First Security epitomized and which the industry agreed to eliminate with the bright line date-of-suit test. The Majority Opinion commits the Utah courts to continued judicial discretion and clever argument by insureds seeking to move, for the insured's convenience (across multiple years and multiple bond periods), the date upon which the insured is deemed to have discovered a loss. In disallowing enforcement of an agreed bright line test, the Court of Appeals substitutes unpredictable judicial distinctions (not found in the bond) for the express agreement of insurers and insureds.

CONCLUSION

The result below has not been justified by Home's response. Home points to new forms in the hope the issue will not arise again. The Majority's freedom to rewrite the central bond concept of discovery of loss, if left unreviewed, will perpetuate such litigation, to the detriment of Utah courts, insured financial institutions, and insurers. Home's desire for a date-of-realization trigger, and the Majority Opinion's arbitrary selection of a date-of-verdict trigger, do no more than return Utah to the situation that prevailed in First Security, when a date-of-suit trigger was as arguable as a date-of-judgment trigger, and each case was a new exercise in judicial definition. There, two different judges in the same case chose the different triggers of date-of-suit and date-of-judgment. Here, there is no excuse for such confusion in the wake of prior contractual agreement to a date-of-suit trigger. Aetna

respectfully urges this Court's review of the contract rewriting that took place below and of the non-enforcement of Section Eleven that occurred in the face of clear contrary precedent.

DATED this 22nd day of November, 1991.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 22nd day of November, 1991, to the following counsel of record:

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